No. 90-909

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1990

PUREX CORPORATION, *et al.*,
Petitioners,

vs.

WILLIS DAY PROPERTIES, INC., *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT ABLE WAREHOUSING & DISTRIBUTING COMPANY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. DOES A UNITED STATES DISTRICT COURT RETAIN JURISDICTION TO ENFORCE A SETTLEMENT AGREEMENT AFTER IT HAS EXPRESSLY CONDITIONED DISMISSAL OF THE UNDERLYING ACTION, AS WITHOUT PREJUDICE, AND WITH LEAVE TO FILE ADDITIONAL SETTLEMENT STIPULATIONS?

II. IS A PARTY ENTITLED TO AN APPELLATE COURT'S DETERMINATION AND APPLICATION OF STATE LAW IN AN ISSUE WHICH WAS NEITHER RAISED IN THE PLEADINGS NOR ARGUED BEFORE THE DISTRICT COURT?

III. DO FEDERAL COURTS VIOLATE A PARTY'S DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN THEY REFUSE TO CONSIDER AN ISSUE OF STATE LAW WHICH WAS NEITHER RAISED IN THE PLEADINGS NOR ARGUED BEFORE THE DISTRICT COURT BY THIS SAME PARTY?

29.1 STATEMENT

Able Warehousing & Distributing Company, Inc. is a wholly owned corporation in the State of New Jersey. It has no parent corporations, affiliates or subsidiaries.

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STATEMENT OF THE FACTS

On February 19, 1987, Purex Corporation and the Dial Corporation ("Purex") filed a diversity action to recover damages to personal property and clean-up expenses caused by a July 7, 1985 fire. The fire occurred at a Toledo, Ohio warehouse owned by Respondent Willis Day Properties, Inc. ("Willis Day") and managed by Respondent Able Warehousing & Distributing Company, Inc. ("Able"). On December 6, 1988, counsel for all parties entered into good faith settlement negotiations to settle Purex's claims for damages. At the settlement negotiations, Purex was represented by Miles A. Jellinek, Esq., both as to Purex's subrogee Certain Underwriters at Lloyd's and as to Purex individually, and Richard F. Ellenberger, Esq., as to Purex individually. Attorney Jellinek acted as lead counsel for Purex and had apparent authority to negotiate all aspects of the case.

On December 6, 1988, the parties agreed to settle this case. Purex in consideration for payment of $650,000 from Willis Day and Able, agreed to release all claims against Willis Day and Able with respect to the July 7, 1985 fire. After the agreement was reached, counsel, on December 6, 1988, informed the district court that the parties had settled. The district court entered a Dismissal Entry the following day which stated:

> Upon consideration, the Court having been informed that the above entitled cause of action has been settled between the parties,
>
> IT IS ORDERED that the docket for this case be marked "settled and dismissed without prejudice." Counsel granted leave to file additional settlement stipulation.

The following day, December 7, 1988, Attorney Jellinek attempted to alter the settlement agreement to reserve Purex's right to assert claims against Willis Day and Able in a related case pending in Lucas County Common Pleas Court.[1] Counsel for Able replied on December 9, 1988 that such a reservation was not a term of the December 6, 1988 agreement. In subsequent discussions,[2] counsel for Able, Willis Day and Purex confirmed the language of the release. As a result of the discussions with Purex's counsel, Able forwarded its settlement draft to Attorney Jellinek.

On February 8, 1989 Attorney Ellenberger attempted to revise the agreed upon release, proposing language which purported to release the claims of both Purex and its subrogee, while reserving the right to assert claims against defendants in the IRI case. On March 13, 1989, Attorney Jellinek attempted another revision of the terms of the agreed upon release with language that released only the claims of the subrogee with no specific language as to the release of claims. It is this March 13, 1989 unilaterally drafted Release that Purex moved the district court to summarily enforce on April 6, 1989.[3]

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[1] *Industrial Risk Insurers v. Purex Corporation* (Lucas County Common Pleas Case No. 88-3849) (hereinafter "the IRI case").

[2] *See e.g.*, December 20, 1988 letter from counsel for Able to Mr. Jellinek: discussions regarding the proposed language of the release (Motion of Able to Enforce Settlement, Exhibit B).

[3] Subsequent to the filing of Purex's Motion to Enforce the Settlement Agreement, Purex submitted a Supplemental Memorandum which purports to present yet another release, this one releasing the claims of Purex.

On April 15, 1989, Willis Day filed its brief in opposition to Purex's motion for entry of judgment and requested an evidentiary hearing on the disputed terms of the settlement agreement. On April 25, 1989, Able filed its motion to enforce the settlement and its opposition to Purex's motion to enforce the settlement.

On July 21, 1989, the district court held an evidentiary hearing on Purex's, Willis Day's and Able's motions. The district court heard testimony in support of each party's position. Furthermore, the parties cross-examined every witness who gave testimony at the hearing.

On September 19, 1989, the district court entered its order denying Purex's motion to enforce the settlement agreement and granting Able's motion to enforce the terms of the settlement agreement. The district court found that the settlement agreement was set forth in a December 29, 1989 letter from Able's Counsel to Attorney Jellinek.

Purex filed its Notice of Appeal on October 17, 1989. On September 11, 1990 the Sixth Circuit Court of Appeals filed its Opinion affirming the district court's decision. Purex then petitioned the Sixth Circuit for a rehearing *en banc*. The Sixth Circuit rejected Purex's petition on October 19, 1990.

ARGUMENT

Purex contends that the Court should grant its petition for writ of certiorari for three reasons: 1) to resolve the conflict among the circuits regarding the jurisdiction of a district court to enforce a settlement after a dismissal; 2) because the appellate court failed to address an issue which was allegedly presented to the district court; and 3) because it was allegedly denied due process. Purex's contentions, however, do not support the Court granting its petition for writ of certiorari.

I. THE SIXTH CIRCUIT'S DECISION IN THE CASE AT BAR DOES NOT CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

Purex states that there is considerable controversy among the Circuit Courts of Appeals on the question whether a district court has jurisdiction to enforce a settlement after its dismissal of the underlying action. The controversy, however, is not as Purex contends. There are two lines of authority on whether a district court has jurisdiction to enforce a settlement agreement after the underlying federal action has been dismissed. *See Hamilton v. School Committee of City of Boston*, 725 F. Supp. 641 (D. Mass. 1989). One line of authority holds that a district court must explicitly retain jurisdiction in order to have authority over purely derivative enforcement claims.[4] *See Fairfax Countywide Citizens Assn. v. Fairfax County*, 571 F.2d 1299 (4th Cir. 1978), *cert. denied*, 439 U.S. 1047; *McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985). The second line of authority holds that the district court has inherent power to enforce agreements that settle federal cases. *See Aro Corp. v. Allied Wittan Co.*, 531 F.2d 1368 (6th Cir. 1976).

[4] Whether the district court has expressed its intentions to retain jurisdiction to enforce a settlement is an issue of fact that is interpreted differently among the circuits. *See McCall-Bey v. Franzen*, 777 F.2d 1178 (7th Cir. 1985); *Hinsdale v. Farmers National Bank & Trust Co.*, 823 F.2d 993 (6th Cir. 1987).

In the case at bar, the Sixth Circuit Court of Appeals held that the district court had the inherent power to enforce agreements entered into in settlement of litigation pending before it. The Court also held that the district court's dismissal order indicates that it intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties. The Sixth Circuit Court of Appeals stated:

> *It is well settled that "courts retain the inherent power to enforce agreements entered into in settlement of litigation pending before them."* [citations omitted]. Further, no specific language is necessary to effect a "conditional" as opposed to an "unconditional" dismissal: "[A]ll that is necessary is that it be possible to infer that [the trial judge] did intend to retain jurisdiction—that he did not dismiss the case outright, thereby relinquishing jurisdiction." [citation omitted.]
>
> *A plain reading of the district court's dismissal order indicates that it fully intended to retain jurisdiction over this matter until settlement stipulations were filed by the parties.* It is also worth noting that the parties, including Purex construed the dismissal as "conditional" as evidenced by the motions for enforcement that were filed with the district court approximately four months subsequent to the district court's dismissal order.[5]

(Emphasis added). Thus, the Sixth Circuit Court of Appeals held that the district court had jurisdiction to enforce the settlement agreement for two reasons: (1) the court's inherent power; and (2) the fact that the court retained jurisdiction over this matter pending the filing of the settlement stipulations.

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[5] It is worth noting that in Purex's April 4, 1989 memorandum in support of its motion for enforcement of the Settlement Agreement, Purex argued that the district court had the inherent power to enforce settlement agreements entered into by parties in a pending action. Purex's current position is irreconcilable with its earlier posture and strains the credibility of this claimed error.

Petitioners contend that its petition for writ of certiorari should be granted because there exists a conflict among the Courts of Appeals regarding the jurisdiction of a district court to enforce a settlement after dismissal of the underlying action. Rule 10.1(a) of Rules of the Supreme Court, however, lists reasons that will be considered for granting a petition for writ of certiorari. Rule 10.1(a) provides:

> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter; ***

Thus, under the Supreme Court Rules, the Court of Appeals' decision must conflict with the decision of another Circuit Court of Appeals in order for this Court to consider granting a petition for writ of certiorari.

In the case at bar, the Sixth Circuit Court of Appeals' decision conflicts with neither the *Aro* line of authority nor the *Fairfax/McCall-Bey* line of authority. Consistent with *Aro*, the Sixth Circuit in the case at bar held that the district court had the inherent power to enforce the settlement agreement at issue. Additionally, the Sixth Circuit, consistent with *Fairfax/McCall-Bey*, held that the district court expressly retained jurisdiction to enforce the settlement agreement. The Sixth Circuit's decision, therefore, comports with both lines of authority regarding a district court's jurisdiction to enforce a settlement agreement after the underlying action has been dismissed.[6] As a result, the Court should deny Purex's petition with respect to the jurisdictional issue.

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[6] Given Purex's failure to raise the lack of jurisdiction issue in the district court and the lack of a conflict between the Sixth Circuit's decision and other jurisdictions, this case is not a good vehicle for review of the jurisdiction issue.

II. A LITIGANT IS NOT ENTITLED TO AN APPELLATE COURT'S DETERMINATION OF AN ISSUE WHICH WAS NOT RAISED IN THE DISTRICT COURT.

Purex contends that the Court should grant certiorari in this case because the Sixth Circuit refused to decide whether Purex's attorney had authority to enter into the settlement agreement. Purex contends that this issue was raised by the evidence and argued by counsel at the evidentiary hearing in the district court. Purex's contention, however, is erroneous.

In April 1989, Purex filed its motion for entry of judgment enforcing the December 6, 1989 settlement agreement. In its motion Purex stated:

> 9. Pursuant to the terms of the settlement set forth in Paragraph 6 above, defendants have transmitted the settlement funds to plaintiffs. However, the settlement checks have not been negotiated by plaintiffs Purex Corporation and The Dial Corporation for the reason that the parties have been unable to agree upon appropriate language for the releases embodying the settlement agreement among the parties.
>
> * * *
>
> 11. As there was no agreement among the parties to settle any claims other than those which form the subject matter of Case No. C 87-7139, plaintiffs respectfully move this Court for an Order enforcing such settlement agreement.

At no time after the filing of its motion to enforce the settlement agreement did Purex attempt to amend the relief sought. Thus, the only issue before the district court was the terms of the settlement agreement.

This fact was emphasized at the hearing where Purex's counsel stated the relief it sought.

> What brings me here is to request that the Court order the following, that either the defendants accept the executed releases that they already have from both Underwriters of Lloyd's and the Purex-Dial Corporations.
>
> In the alternative, that the Court make findings of fact as to what the terms of the settlement on December 6, 1988 were such that those findings are binding on all of the parties as if releases were executed to that effect, and further that the Court order the Purex and Dial Corporation to endorse the settlement checks promptly so that this thing can be finally put to bed.

Purex never raised the lack of its attorneys' authority to settle the case at the district court level. Federal Rules of Civil Procedure 46 requires a party to make known to the court the action which the party desires the court to take. Purex, however, never properly raised the lack of authority issue with the district court nor did Purex otherwise attempt to give the district court any opportunity to review this issue, for example, by way of motion for clarification or for reconsideration.

On appeal, Purex for the first time raised the lack of authority issue. The Sixth Circuit held:

> [W]e find nothing in the record which indicates that Purex raised the issue of its attorney's authority to settle this lawsuit in the lower court. There are no facts, nor is there any ruling by the district court, from which this Court can properly review Purex's contention that its attorneys overreached their settlement authority. Accordingly, we hold that Purex did not properly preserve this issue for appeal. *Bailey v. Chattem, Inc.*, 684 F.2d 386 (6th Cir. 1982).

Thus, the Sixth Circuit properly refused to decide the issue of whether Purex's attorneys had authority to enter the December 6, 1988 settlement agreement.

Generally, appellate courts do not consider issues that were not presented to the district court. *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713 (1985). The Sixth Circuit refused to decide the authority issue because it had not been raised in the district court. Moreover, this Court does not generally review factual determinations which the lower courts make. *See United States v. Johnston*, 268 U.S. 220 (1925). A writ of certiorari will be granted only when there are special and important reasons. Sup. Ct. R. 10. As a result, the Court should deny Purex's petition with respect to the authority issue.

III. THERE ARE NO DUE PROCESS CONCERNS WHEN AN ISSUE IS NOT RAISED IN THE DISTRICT COURT.

Petitioners contend that it was a violation of the Due Process Clause of the 14th Amendment for the district court and Sixth Circuit to refuse to decide the issue of whether Petitioner's attorneys had the authority to enter into the December 6, 1988 settlement agreement. As stated above, this constitutional issue was not raised in the district court, nor did Purex raise it with the Sixth Circuit.

In *Singleton v. Wulff*, 428 U.S. 106, 96 S. Ct. 2868 (1976), the Court held:

> It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. In *Hormel v. Helvering*, 312 U.S. 552, 556, 61 S.Ct. 719, 721, 83 L.Ed. 1037 (1941), the Court explained that this is "essential in order that parties may have the opportunity to offer all evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which they have had no opportunity to introduce evidence."

Id. at 120, 2877. Further, federal courts will avoid constitutional questions where nonconstitutional grounds can be dispositive of the issues. *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981). As the above-cited authorities establish, this Court need not address Petitioner's constitutional claims. Accordingly, the Court should not grant certiorari with respect to the due process issue.

CONCLUSION

For the reasons set forth above, Respondent Able Warehousing & Distributing Company, Inc. respectfully requests that this Court deny Purex's Petition for Writ of Certiorari.

Respectfully submitted,

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